12.

No. 2638.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

October Term, 1915.

Geo. S. Fullinwider,
Complainant and Appellant,

vs.

The Southern Pacific Railroad Company of California, et al.,
Defendants and Appellees.

BRIEF FOR COMPLAINANT AND APPELLANT.

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STATEMENT OF THE CASE.

This is an appeal from the decision of the United States District Court for the Southern District of California, Southern Division, sustaining the defendants' motion to dismiss the complainant's cause of action and bill of complaint.

On the 23rd day of November, 1914, the complainant filed herein his amended bill in equity. [Record, p. 7.]

On the 18th day of December, 1914, the defendants, the Southern Pacific Company, a corporation; the Southern Pacific Railroad Company of California, a corporation; and the Imperial Valley Farm Lands Association, a corporation of California, filed their motion in said court to dismiss complainant's amended bill in equity. [Record, p. 15.]

On the 21st day of December, 1914, the defendant, the California Land & Water Company, filed its motion to dismiss complainant's amended bill in equity. [Record, p. 6.]

On the 26th day of January, 1915, the defendant, the Central Trust Company of New York, filed its motion to dismiss complainant's amended bill in equity. [Record, p. 6.]

On the 18th day of January, 1915, the defendant, the Equitable Trust Company of New York, filed its motion to dismiss complainant's amended bill in equity. [Record, p. 6.]

That on the 5th day of April, 1915, the complainant and all of the defendants appeared in court by their respective solicitors and counsel and said motions were all submitted to the court, and the court, after hearing the arguments of counsel and being fully advised in the premises, sustained the motions of defendants and each of them in its general order and judgment was entered in this case without leave for the complainant to amend his complaint. [Record, p. 6.]

The propositions involved in this controversy are a construction of the acts of Congress of July 27, 1866

(14 S. at L. 292), and March 3, 1871 (16 S. at L. 573), and May 2nd, 1872 (17 S. at L. 59).

The act of July 27, 1866, was an act incorporating the Atlantic and Pacific Railroad Company and to aid in the construction of its road, and contained the usual provisions that were incorporated in all of these acts of Congress making grants to aid in the construction of their roads.

The act of March 3, 1871, and the act supplementary thereto of May 2, 1872, were acts incorporating the Texas & Pacific Railroad Company and to aid in the construction of its railroad, with the usual terms and conditions that were incorporated in all of the railroad grants also.

The questions involved in this action is the construction of sections 3 and 18 of the act of July 27, 1866.

Section 3 of said act is as follows:

> "And be it further enacted: That there be, and hereby is, granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes

through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said "Atlantic & Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may

be selected as above provided: And provided further, that the word 'mineral' when it occurs in this act, shall not be held to include iron or coal: And provided further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.' "

Section 18 of the act of July 27, 1866, is as follows:

"And be it further enacted: That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

14 Stat. at L. 292.

And sections 9 and 23 of the act of March 3, 1871. Section 9 of said act is as follows:

"That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on

each side of said railroad line, as such line may be adopted by said company, through the territories of the United States, and ten alternate sections per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied, or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said railroad may be selected as above provided; and the word 'mineral' where it occurs in this act shall not be held to include iron or coal: Provided, however, that no public lands are hereby granted within the state of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the land originally granted. The term 'ships channel,' as used in this bill, shall not be construed as conveying any greater right to said

company to the water front of San Diego bay than it may acquire by gift, grant, purchase or otherwise, except the right-of-way, as herein granted: And provided further, that all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

Section 23 of said act is as follows:

"That, for the purpose of connecting the Texas and Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California (subject to the laws of California) is hereby authorized to construct a line of railroad from a point at or near Tehachapi Pass by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six, provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

16 Stat. at L. 573.

The complainant avers in his amended bill in equity after the usual formal allegations as to the character

and corporate capacity of the defendants, substantially as follows:

That there was granted to the defendant, the Southern Pacific Railroad Company of California, by the act of Congress of March 3, 1871, under and by virtue of section 23 of said act, the following described tract of land, together with other lands, to-wit:

The south one-half of section five (5), township eleven (11) south, range fourteen (14) east, San Bernardino Base and Meridian, lying and situate in the county of Imperial and state of California.

The complainant further avers that said grant was made upon a condition and subject to the proviso contained in the latter part of section 9 of the act of March 3, 1871, which was in words and figures as follows, to-wit:

> "And provided further, that all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all lands herein granted."
>
> 16 Stat. at L. 573.

The complainant further avers that said Southern Pacific Railroad Company of California had completed its road more than ten (10) years prior to the commencement of this action and that the above described tract of land had not been sold or otherwise disposed

of by the defendants within three years after the completion of its entire road.

The complainant further avers that the lands above described were lands that the defendant, the Southern Pacific Railroad Company, was qualified to acquire from the government under said grant and were within the place limits of said grant.

The complainant further avers that he has tendered to the defendants the sum of $2.50 per acre or eight hundred dollars in gold coin of the United States and thereupon demanded of the defendants a conveyance by the defendants to the complainant of all their right, title and interest in and to said lands which demand was by the defendants refused.

The complainant further alleges that said lands and the subject of this controversy exceed in value the sum of three thousand ($3,000.00) dollars.

The complainant further alleges that he was eligible and qualified at the time of filing his original bill in equity herein, and also at the time of filing his amended bill in equity and still is, to settle upon and pre-empt public lands of the United States and was a duly qualified entryman under the desert land laws of the United States and was and is duly qualified to purchase said lands under said acts of Congress above referred to in amounts not to exceed three hundred and twenty acres.

The complainant further avers that he offers to pay into court the sum of eight hundred dollars to be paid to the defendants or such one of the defendants as the court may determine is the one entitled to receive said

money, upon the execution to him of a proper conveyance to said premises.

The complainant further avers that he was informed and believes it to be true that the other defendants, aside from the Southern Pacific Railroad Company of California, and each and every one of them have or claim some interest in or to the subject-matter of this action, the exact character or nature of which the complainant was and is unable to state, but demands that whatever interest said defendants or any of them have in or to the subject-matter of this action, that they be compelled to come into court and set up that interest.

The complainant in his amended bill in equity asked the court:

First: That a construction and interpretation be made by it of said sections of said acts of Congress, and especially of sections 9 and 23 of the act of Congress approved March 3, 1871, together with the supplementary act passed by Congress on May 2nd, 1872, and all other acts that have any relation to the application and construction of the act of March 3, 1871.

Second: That it be adjudged and ordered by the court that the defendants, upon the payment into court of the amount of eight hundred dollars, tendered to it for said land, be compelled to convey to the complainant all their right, title and interest in and to the lands hereinbefore described.

Third: That the complainant have such other and further general relief as in equity and good conscience he is entitled to. [Record, p. 7.]

To this amended bill in equity the Southern Pacific Railroad Company and the Imperial Valley Farm Lands Association filed the following motion to dismiss the action and bill. Said motion, omitting the formal parts, being in words as follows, to-wit:

"This court is without jurisdiction of the subject-matter of said action, and is without jurisdiction to hear or determine said cause on its merits.

"That said bill of complaint does not state facts sufficient to constitute a cause of action in equity or otherwise or at all." [Record, p. 14.]

And all the other defendants entered their appearance and filed a motion to dismiss, substantially in the same language, as hereinbefore referred to. All of said motions were submitted together and ruled upon by the court in one order or decree.

On the 26th day of April, 1915, omitting the formal parts, the following decree was signed, entered and recorded in this action, to-wit:

"This cause having come on to be heard at this term on the 5th day of April, 1915, on the motions of the defendants to dismiss the amended bill of complaint, and having been argued by counsel for the respective parties at said time, and the court having at said time ordered that said motions to dismiss be sustained without leave to amend:

"Now, therefore, it is hereby ordered and decreed that said amended bill of complaint be, and the same is hereby finally dismissed, and judgment is hereby given the said defendants for their costs in this suit in the

sum of thirty-four 40/100 ($34.40) dollars." [Record, p. 17.]

(Signed) BENJAMIN F. BLEDSOE,
District Judge.

The appellant, Geo. S. Fullinwider, has appealed to this court from the judgment and decree of the District Court as hereinbefore set out. [Record, p. 38.]

ASSIGNMENT OF ERRORS.

The complainant and appellant filed seventy-three assignment of errors.

It is unnecessary to set forth at length all of these assignment of errors. They are sufficiently full to raise all questions of law which are presented by the pleadings and they challenge the correctness of each of the particular matters adjudged and decreed by the court. [Record, p. 18.]

This complainant and appellant calls attention to some of the assignment of errors as follows:

1. The court erred in sustaining the motion to dismiss of the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company and the Imperial Valley Farm Lands Association to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

2. The court erred in sustaining the motion to dismiss of the defendant, the Central Trust Company, to the amended bill of the complainant and directing that

said amended bill be dismissed for want of equity in said amended bill.

3. The court erred in sustaining the motion to dismiss of the defendant, the Equitable Trust Company, to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

4. The court erred in sustaining the motion to dismiss of the defendant, the Southern Pacific Land Company, to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

5. The court erred in sustaining the motion to dismiss of the defendant, the California Land & Water Company, to the amended bill of the complainant, and directing that said amended bill be dismissed for want of equity in said amended bill.

6. The court erred in sustaining the motion of the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, and the Imperial Valley Farm Lands Association, to dismiss on the ground that the court was without jurisdiction of the subject-matter of said action and was without jurisdiction to hear and determine said cause on its merits.

7. The court erred in sustaining the motion of the defendant, the Central Trust Company, to dismiss on the ground that the court was without jurisdiction of the subject-matter of said action and was without jurisdiction to hear and determine said cause on its merits.

8. The court erred in sustaining the motion of the defendant, the Equitable Trust Company, to dismiss on the ground that the court was without jurisdiction of the subject-matter of said action and was without jurisdiction to hear and determine said cause on its merits.

9. The court erred in sustaining the motion of the defendant, the Southern Pacific Land Company, to dismiss on the ground that the court was without jurisdiction of the subject-matter of said action and was without jurisdiction to hear and determine said cause on its merits.

10. The court erred in sustaining the motion of the defendant, the California Land & Water Company, to dismiss on the ground that the court was without jurisdiction of the subject-matter of said action and was without jurisdiction to hear and determine said cause on its merits.

* * * * * * * *

16. The court erred in that it did not hold that the amended bill of complaint of the complainant stated a good cause of action to which the defendants and each of them should be required to file their answer or plea.

17. The court erred in entering a decree in favor of the defendants, dismissing the complainant's amended bill and entering judgment against complainant in favor of the defendants for their cost and disbursements herein.

18. The court erred in not granting to said complainant the relief prayed for by him in his said amended bill.

19. The court erred in not granting to said complainant any equitable relief.

(a) As said amended bill contains allegations and matters entitling said complainant to equitable relief.

(b) Said amended bill contains allegations and matters entitling the said complainant to the relief prayed for in said amended bill.

* * * * * * * *

21. The court erred in not holding that the proviso in section 9 of the act of Congress of March 3, 1871, was a conditional limitation. Said proviso in section 9 of said act is as follows:

> "That all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

22. The court erred in not holding that the said proviso copied in assignment No. 21 was a conditional limitation.

That the happening of the conditions subsequent therein specified entitled the complainant herein to a specific performance of said contract upon the payment to the defendants of the amount of $2.50 per acre.

23. The court erred in holding that there was not jurisdiction in the court on the equity side to enforce a specific performance of said contract on behalf of

the complainant upon the happening of the conditions subsequent in said proviso of section 9 of said act of Congress of March 3, 1871.

24. The court erred in not holding that the proviso in section 9 of the act of March 3, 1871, providing "that said lands not sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and pre-emption like other lands," was sufficiently definite to be enforced as a conditional limitation.

25. The court erred in not holding that the proviso in section 9 of the act of March 3, 1871, was a binding contract upon the defendants and each of them, by which they and each of them were obligated to convey all interest they had in said land described in complainant's amended bill, upon the payment by the complainant to them or to whichever one of the defendants the court should direct the same should be paid to, of $2.50 per acre.

26. The court erred in not holding that this suit can be maintained by complainant as one to enforce a specific performance of said contract or proviso.

(a) The defendants hold the legal title to and the possession of the said granted lands.

(b) Complainant having asked for specific performance, equitable relief may and can be granted him by specific performance.

27. The court erred in not holding that the provisions of said act of March 3, 1871, making said land grants, wherein it was provided "that all lands not sold or otherwise disposed of within three years after

the completion of the entire road should be subject to settlement and pre-emption like other lands, etc.," were both positive and negative, requiring the grantees and especially these defendants and each of them to sell to this complainant and to settlers who should apply to buy and who were eligible to settle upon or pre-empt public lands, at a price not greater than an average of $2.50 per acre, and requiring said defendants to refrain from selling any of the granted lands to other than persons eligible to settle and pre-empt public lands, in such quantities as is provided by law for the disposition of public lands and at a price not greater than an average of $2.50 per acre.

* * * * * * * *

31. The court erred in not holding that the proviso in section 9 of the act of March 3, 1871, was designed to devote said lands conveyed by said grants "that had not been sold or otherwise disposed of by the defendants within three years after the completion of the entire road," to settlement and to prevent the monopoly of said lands. That said grant was a law as well as a grant, that said defendants could not defeat the purpose of the proviso requiring sales to settlers and pre-emptors, by themselves monopolizing and holding the lands and by refusing to sell at all or by refusing to sell any of them except to such persons and in such quantities and at such prices as they or either of them saw fit.

32. The court erred in holding that the proviso in section 9 of the act of Congress of March 3, 1871, was not a conditional limitation, the acceptance and agree-

ment to perform which was imposed by Congress as a condition precedent to the right of the defendants or either of them to accept and become vested with the title to the lands under the grant of March 3, 1871.

* * * * * * * *

34. The court erred in refusing to enter a decree of specific performance on behalf of Geo. S. Fullinwider, the complainant herein, and against the defendants, the Southern Pacific Railroad Company of California and each and every one of the other defendants claiming an interest in said lands or claiming by, through or under it, requiring said defendants to convey to the complainant the lands sought to be purchased by him, upon payment to them of the purchase price therefor, of $2.50 per acre.

* * * * * * * *

37. The court erred in refusing to direct and decree a specific performance on behalf of the complainant against the defendant, the Southern Pacific Railroad Company of California and the other defendants claiming an interest in said lands or claiming by, through or under it, requiring said defendants to convey to said complainant the lands sought to be purchased by said complainant as prayed for in his amended bill.

38. The court erred in holding that the proviso in said grant did not constitute a contract entered into by and between the defendant, the Southern Pacific Railroad Company of California, and the government, for the benefit of and enforceable by, the complainant.

39. The court erred in holding that the proviso in section 9 of the act of March 3, 1871, providing "that

said lands should be subject to settlement and pre-emption like other lands, that were not sold or otherwise disposed of by the defendants within three years after the completion of the entire road," was not a conditional limitation for the use and benefit of this complainant and those who in good faith, being eligible to make settlement and pre-empt public lands, who should apply to make settlement upon said lands and to purchase the same in quantities and at the price provided by said act.

40. The court erred in holding that the defendants, by the provisions of said grant contained, did not take in all lands still held by them under said grant which had not been sold or otherwise disposed of as provided, etc.," a conditional limitation estate therein for the use and benefit of the complainant.

(a) The nature and quality of said interest in said grant are sufficiently specific and definite.

(b) The application to purchase, and tender of payment, and being eligible to make settlement and preemption on public lands is a sufficient identification.

41. The court erred in not holding that the offer and tender of the complainant to purchase the lands described by him in his amended bill of complaint, from the defendant, the Southern Pacific Railroad Company of California and the other defendants claiming an interest in said lands or claiming by, through or under it, gave to the complainant a vested right in said lands in default of acceptance of such offer and a conveyance to him by the defendants.

42. The court erred in not holding that the proviso

in the act of March 3, 1871, is sufficiently definite and certain to be enforced as a conditional limitation.

* * * * * * * *

43. The court erred in not holding that the proviso in the act of March 3, 1871, was a conditional limitation, impressed upon and running with the title to the land until the title should have ultimately become vested in a settler upon the terms and under the conditions provided in said grant.

* * * * * * * *

49. The court erred in not holding that Geo. S. Fullenwider, the complainant herein, was entitled to the relief prayed for in his amended bill herein or to any relief, and in holding that said amended bill of complainant should be dismissed.

50. The court erred in not holding that the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, the Southern Pacific Land Company and the California Land & Water Company, individually and collectively, any or either of them, had violated the provisions of said act of Congress of March 3, 1871, relative to settlement and pre-emption of said lands by denying complainant's right under said act.

* * * * * * * *

52. The court erred in not holding that said proviso in section 9 of the act of March 3, 1871, is enforceable by the complainant.

53. The court erred in not holding that it was impossible for the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, the Southern Pacific Land Company, and the California Land & Water Company, or any or either of them, to receive said grant with the same "rights, grants and privileges" as those contained in the act of July 27, 1866, for the reason that the time within which they were required to perform the conditions of sections 8 or 12 of said act were not extended.

53½. The court erred in holding that under section 23 of the act of March 3, 1871, the Southern Pacific took said grant under the act of July 27, 1866.

(a) That said act of July 27, 1866, is not sufficiently designated by said section in order for the court to determine just what act of 1866 was referred to.

(b) That the reference of section 23 of said act of March 3, 1871, to the act of 1866 is too indefinite and uncertain.

54. The court erred in holding that the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, the Southern Pacific Land Company and the California Land & Water Company, individually or collectively, or any or either of them, were not

bound by all of the terms and conditions or the whole of the act of Congress of March 3, 1871.

55. The court erred in not holding that the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, the Southern Pacific Land Company, and the California Land & Water Company, individually or collectively, or any or either of them, took said grant with all the "rights, grants and privileges, and subject to all of the limitations, restrictions and conditions" of the act of March 3, 1871, as well as any limitations, restrictions and conditions contained in the act of July 27, 1866.

* * * * * * * *

60. The court erred in not holding that the complainant, being eligible to make settlement and preempt public lands, had a right to enforce specific performance of contract from the defendants, the Southern Pacific Railroad Company of California or any of the defendants claiming an interest in it, or claiming by, through or under it, upon payment to them of $2.50 per acre.

* * * * * * * *

65. The court erred in not holding that the defendant, the Southern Pacific Railroad Company of California and its successors in interest, and the defendants, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the

Equitable Trust Company, the Southern Pacific Land Company and the California Land & Water Company, and any or either of them, under said land grant of the act of March 3, 1871, in any event, were required to sell all the lands not otherwise sold or disposed of within three years after the completion of the entire road, etc., to citizens eligible to make settlement and pre-emption of public lands.

66. The court erred in not holding that the proviso in the act of March 3, 1871, and the acts amendatory thereof were operative and enforceable laws and contracts and required the defendants to sell said lands to persons only eligible to make settlement and pre-emption in such quantities as is provided by law for the distribution of the public land and at a price not to exceed an average of $2.50 per acre, and that it prohibited them or either or any of them as to all lands remaining unsold three years after the completion of the entire road, to sell to persons other than those eligible to make settlement and pre-emption upon public lands.

67. The court erred in not holding that Congress had waived all of the preliminary steps necessary for actual settlers to take in order to acquire a right in the public domain except that of paying to the defendants the purchase price for said land not to exceed an average of $2.50 per acre.

* * * * * * * *

69. The court erred in not holding that the defendant, the Southern Pacific Railroad Company of California and the other defendants claiming an interest in

said land or claiming by, through or under it, had violated said law and contract which they entered into when they accepted said grant under the act of March 3, 1871, and had thereby defeated the primary object, purpose, intent, and settled policy of Congress in regard to public lands involved in these land grants and especially in this one.

70. The court erred in not holding that the defendant, the Southern Pacific Railroad Company of California and the defendants claiming an interest in said lands so granted or any of the defendants claiming by, through or under it, had waived their right to fix a price upon said lands other than an average of $2.50 per acre and should be compelled to convey the same upon payment to them of the maximum price of $2.50 per acre by this complainant.

71. The court erred in not holding that Congress has the absolute control over the settlement, sale and distribution of the public lands and that it has the power to waive any and all of the preliminary steps that might be required to be taken to initiate on the part of a settler or pre-emptor, a vested right to public lands, and that it did, under the terms and conditions of the act of March 3, 1871, waive all of the preliminary steps and conditions required of settlers and pre-emptors to be done, except that they must be eligible to take public lands and must pay the defendants the purchase price, and that upon the happening of these two conditions, the equitable title to the land became vested in the complainant or settler.

72. The court erred in sustaining the defendants

and each of their motions to dismiss and directing that the complainant's bill be dismissed without leave to amend.

73. The court erred in sustaining the defendants and each of their motions to dismiss the complainant's bill and in not directing that said complainant be permitted to amend his bill within a time fixed by the court, or that the same should be dismissed. [Record, pp. 19-37.]

The issues raised by the defendants' demurrer or motion to dismiss, the character of the arguments advanced and the natural classification of the subject will be presented to the court under the following propositions or topics for discussion:

I.

WAS THIS GRANT OF LANDS TO THE SOUTHERN PACIFIC RAILROAD COMPANY UNDER THE ACT OF MARCH 3, 1871, MADE SUBJECT TO THE RIGHTS, GRANTS AND PRIVILIEGES OF SAID ACT, OR UNDER THE RIGHTS, GRANTS AND PRIVILEGES OF THE ACT OF JULY 27, 1866, AND SUBJECT ONLY TO ITS TERMS?

II.

IF THE DEFENDANTS TOOK THIS GRANT UNDER THE TERMS AND CONDITIONS OF THE ACT OF 1871, WHAT IS THE CHARACTER OF THE ESTATE THEY BECAME VESTED WITH?

III.

WHAT RIGHTS WOULD THIS COMPLAINANT, WHO IS ELIGIBLE TO SETTLE AND PRE-EMPT PUBLIC LANDS, HAVE UNDER SAID ACT WHERE THE COMPANY HAD NOT SOLD OR OTHERWISE DISPOSED OF THE GRANTED LANDS WITHIN THREE YEARS AFTER THE COMPLETION OF ITS ENTIRE ROAD?

Brief and Argument of the Appellant, Geo. S. Fullinwider.

The amount involved in the suit of this complainant and appellant is not so much, but the construction of the court in construing these statutes and the status and rights of the complainant and defendants under them are propositions that involve property worth many millions of dollars, between, perhaps, one and two million acres of land, much of it being land of great fertility and productiveness. For almost forty years the defendants have failed and refused to dispose of these lands to settlers at any price. The result has been that the improvement and development of these valleys, wherein these granted lands lie, has been obstructed and held back, to the great damage and detriment of settlers who were anxious to settle upon and improve these lands and make their permanent homes there; to the great damage also to the state of California, within whose boundaries these lands lie, the settlement and improvement of which would add many

desirable citizens to the state's population, add to her wealth by reducing to cultivation this vast area of valuable lands, and adding millions to her wealth in the way of reclaiming and increasing in value these waste desert lands, lastly depriving these defendants themselves of a perpetual asset which would grow in value yearly, by having this country settled and improved by thrifty and industrious people who would be continual and perpetual patrons of the road, to the amount of millions of dollars annually.

It is the earnest desire of this complainant and appellant that the court pass upon the crucial propositions herein presented by the defendant's demurrer or motion to dismiss and construe the acts of Congress involved herein, and thereby determine the status and rights of the parties.

The importance of having any question as to the title of these lands forever put to rest is so great and of such public interest and concern that it seems to us that there should be no delay in attempting on the part of both the complainant and the defendants, of getting a full and careful hearing of these questions and have them carefully considered by the court and a final adjudication entered, clearly defining the rights and status of all of the parties hereto in such a way that these valuable possessions may be no longer held back from settlement and development. The interests of the public, as well as of the parties to this litigation, it seems to us, urgently demand that a speedy and final determination and settlement of these titles should be adjudicated.

It is admitted by all parties and has been so adjudicated by the courts in a number of cases, that the Southern Pacific Railroad Company took the grant of the lands involved in this controversy under the act of March 3, 1871.

S. P. R. R. Co. v. U. S., 168 U. S. 29;
S. P. R. R. Co. v. U. S., 183 U. S. 529;
S P. R. R. Co. v. U. S., 189 U. S. 448;
U. S. v. S. P. R. R. Co., 146 U. S. 595;
S. P. R. R. Co. v. U. S., 223 U. S. 564.

I.

Was this Grant of Lands to the Southern Pacific Railroad Company under the Act of March 3, 1871, made subject to the Rights, Grant and Privileges of said Act or under the Rights, Grants and Privileges of the Act of July 27, 1866, and subject only to its terms.

This proposition is rudimentary, that in construing acts of Congress, the courts will ascertain, if possible, what the intent of Congress was in passing these laws, and when that intent is ascertained, it must be carried out and given effect by the court. This rule has been settled by a number of authorities of the Supreme Court of the United States, and we shall content ourselves by simply citing the authorities:

Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 55, 40 L. Ed. 74;
St. Paul M. & M. R. R. Co. v. Greenhalgh, 26 Fed. 568;
Leavenworth R. R. Co. v. U. S., 92 U. S. 740, 23 L. Ed. 638;

Winona & St. Peter R. R. Co. v. Barney, 113 U. S. 625;

Mo. etc. Ry. Co. v. Kansas Pac. Ry., 97 U. S. 497, 24 L. Ed. 1095.

Justice Field, in the case of Winona & St. Peter Railroad Company v. Barney, *supra,* in the opinion says that it is not always an easy matter to determine this intent, and uses this language:

> "We must look, in order to ascertain this intent, to the condition of the country when the acts were passed, as well as the purpose declared on their face, and read all parts of them together."

The rules of construction on these public land grant acts or statutes of Congress are:

(a) They are to be construed as laws, and the rules which under common law control the construction of conveyances between private persons do not apply.

(b) These grants are all construed most strongly in favor of the government or the public and against the grantee.

These propositions at this time are rudimentary, having been passed upon by the courts so often it has become the rule of all of the courts of the country, and as was well said in the case of the Oregon and California R. R. Co. v. the United States, 59 L. Ed. 917:

> "It is not necessary to review the cases cited respectively to sustain and oppose the contending arguments. The principles announced in the cases

are rudimentary, and may be assumed to be known, and the final test of their application to be the intention of the grantor."

In support of these propositions, the following cases are also cited:

Dubuque & Pacific R. R. v. Litchfield, 64 U. S. 66, 16 L. Ed. 509;

Mills *et al.* v. County of St. Clair, 49 U. S., 12 L. Ed. 1207;

Leavenworth R. R. Co. v. U. S., *supra;*

Wisconsin Central R. R. Co. v. Forsythe, *supra;*

Mo. etc. Ry. Co. v. Kansas Pac., *supra;*

Sioux City etc. v. U. S., 159 U. S. 360, 40 L. Ed. 177;

Slidell v. Grandjean, 111 U. S. 437, 28 L. Ed. 321;

Knoxville Water Co. v. Knoxville, 200 U. S. 33, 50 L. Ed. 359;

Schullenberg v. Harriman, 88 U. S. 62, 22 L. Ed. 551;

Platt v. U. Pac. R. R. Co., 99 U. S. 58, 25 L. Ed. 424;

Barden v. Northern Pac. R. R., 154 U. S. 325, 38 L. Ed. 992;

U. S. v. Oregon & Cal. R. R., 186 Fed. 892;

St. Paul M. & M. Ry. Co. v. Greenhalgh, *supra.*

In order to arrive at what Congress had in mind and what it intended to do by the act of March 3, 1871, it is necessary to consider, in a brief way, certain his-

torical facts and legal propositions, in order to arrive at a correct construction of section 23 of this act.

This idea must be borne in mind at all times also that the act of March 3, 1871, was the last act ever passed by Congress making a grant of public lands to railroads.

Counsel for the defendants in the case of Burke v. the Southern Pacific Railroad Company of California, submitted to Judge Bledsoe, the trial judge in this case, on the 15th of February, 1915, in his brief filed in that case, uses this significant language:

"This section (section 23 of the act involved in this controversy) was not contained in the bill as originally introduced and was not added until just before the final passage of the act. At the time the bill was introduced all the great railroad grants had been made and Congress was not disposed to make any further grants. In fact, the Texas Pacific grant is the very last railroad grant that was ever made. It would have failed but for the general feeling that the Southern states should have an opening to the Pacific."

He undoubtedly expresses the prevailing sentiment of the country in regard to these land grants to railroads as it existed at that date.

(1) History of the Land Laws.

The court should always consider and bear in mind two important policies of Congress developed by the experience of the country from its beginning up to the date of the passage of this act.

(a) The policy of Congress in regard to the public

domain and the history of the development of this policy.

(b) The policy of Congress in regard to making grants of public lands for internal improvements, including aid to railroads.

The history and development of these two policies have been so fully and carefully presented to this court and also to the Supreme Court of the United States recently in the case of the Oregon and California Railroad Company *et al.* v. the United States of America *et al.* (59 L. Ed. 917), that it does not seem to us that it is necessary to any more than briefly call the court's attention to the history and evolution of these policies.

The court, in the opinion in this case, said:

> "The argument to support the contention is based first on the general considerations that experience had demonstrated to the country the evils of unrestricted grants, and that the bounty of Congress had been perverted into a means of enriching 'a few financial adventurers,' and that lands granted for national purposes 'were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad companies.' Informed by such experience, in substance is the contention, and solicited by petition and moved by the reasoning of some of its members, Congress changed its policy of unqualified bounty, and while not refusing to contribute to the aid of great enterprises, sought to prevent the perversion of such aid to selfish and personal ends, and to promote the development of the country by the disposition to actual settlers of the lands granted."

At the establishment of this government the public lands were considered a public asset to be disposed of and the proceeds derived from the disposition of the same to be used in paying the government's debts and defraying its running expenses.

However, from the very beginning there was a strong minority sentiment in favor of utilizing the public lands for actual settlers, limiting the amount of land and the terms upon which these actual settlers could acquire the same. The sentiment in favor of retaining the public lands as a national asset was so strong, however, that in 1807 a law was passed by Congress making it a misdemeanor for anyone to settle upon any of the public lands except they had been purchased by public sale or were disposed of by them after having been exposed to public sale as was the original policy of Congress in disposing of the public domain. This law, however, remained practically a dead letter.

The struggle between the parties who favored the policy of retaining the lands as a national asset and those who favored the distribution of them among actual settlers was waged incessantly for forty years. During that time, not less than thirty acts of Congress were passed to relieve settlers who had located upon the public lands in violation of the penal statute making it a misdemeanor to so do.

Pre-Emption Law.

In 1841 the first general law was passed by Congress giving citizen settlers, who desired and were

willing to occupy the lands for homes, the preferred right. This is what is popularly known as the "pre-emption law." This law immediately became very popular.

At first it only included certain portions of the surveyed public lands, but very soon amendatory laws were passed by Congress which made it applicable to all public lands in all parts of the country, surveyed or unsurveyed.

HOMESTEAD LAW.

Soon after the passage of the pre-emption law the agitation for a homestead law became very pronounced in the country, and between 1850 and 1860 the political parties incorporated planks in their platforms pledging themselves to give to the people a general homestead law. This homestead law was passed and became a law in 1862. It also was a popular measure with the people.

These laws have continued up to this day as a part of the general land law policy of the country, and have never been changed in any way except to expand and make more liberal their terms.

This briefly is the history of the public land laws as enacted by Congress, which could be elaborated upon very much. It shows how long and how hard a proposition it was to crystallize a sentiment to establish the rights of a free people who had established a government, to protect the best interest of its individual citizenship, and to enable it to distribute its resources fairly and equitably to its people.

Development of the Policies of Congress in Regard to the Public Domain and Donations of Public Lands to Railroads.

The history of the grants of public lands in aid of railroads was enacted in three distinct periods.

The first period commenced with the Illinois Central grant to the state of Illinois on September 20, 1850, and ended with the grant to the territory of Minnesota on March 3, 1857.

All of these grants were made to the states or territories, to be used by them in encouraging internal improvements.

For more than five years, from March 3, 1857, until July 1st, 1862, there were no other grants in aid of internal improvements.

The second period commenced with the Pacific Railroads Bill on July 1st, 1862, and ended with the Stockton & Copperopolis grant of March 2, 1867.

Nearly all of these grants were made to federal corporations. For the next two years, from March 2, 1867, to March 3, 1869, there were no grants in aid of railroads or any other internal improvements.

The third period commenced on March 3, 1869, and ended on March 3, 1871. During this period only two railroad grants were made, the act of May 4, 1870, to the Oregon Central Railway Company, the same being the act involved in the Oregon case, *supra,* and the Texas Pacific grant, of March 3, 1871, which is the act involved in this cause.

Evils of Unrestricted Grants.

The condition of the country from 1850 until the close of the Civil War, covering the first two periods of railroad grants, was such that the evils growing out of these unrestricted railroad grants had not been fully anticipated by the country. The wonderful development and expansion of the country in commercial and business ways, immediately following the Civil War were such that the evils resulting from these different unrestricted grants to these railroads showed up in a most prominent manner, especially in the Pacific railroad grants, and the sentiment of the country changed very rapidly and an opposition to these public grants to railroads became so strong that from March 3, 1869, up to the passage of this act in 1871, there was not a grant made or a grant revived or the time for fulfilling the conditions of a grant, extended by Congress that did not have attached to it a settler's clause restricting the railroad companies' right to sell the lands granted.

Subsequent to 1867, in the discussion of these questions in Congress, the sentiment was unanimous, as appears by the records of Congress, in favor of placing on these grants restrictions that they should be sold by the railroad companies to settlers only, in limited amounts and at a maximum price fixed by the acts.

These questions were exhaustively discussed in the brief of the government filed in the Oregon case, *supra*. They were also discussed and referred to in the elaborate opinion of Judge Wolverton in the Oregon case found in 186 Fed. at page 861.

The Supreme Court in the case of Oregon & California Railroad v. The United States (59 L. Ed. 917), recognized judicially the change of sentiment of the country in regard to the public land and railroad grant policies. In the opinion it uses this language:

> "In the first grants to railroads there were no restrictions upon the disposition of the lands. They were given as aids to enterprises of great magnitude and uncertain success, and which might not have succeeded under a restrictive or qualified aid. However, the change of times and conditions brought a change in policy, and while there was a definite and distinct purpose to aid the building of other railroads, there was also the purpose to restrict the sale of the granted lands to actual settlers. These purposes should be kept in mind and in their proper relation and subordination."

This quotation establishes the fact that our highest court has recognized the change of policy that the legislation of the country has undergone in regard to these two important matters.

(2) History of the Bill of March 3, 1871.

The act of March 3, 1871, was introduced in the Senate on the 9th of March, 1870. (2nd Sess. 41st Con. C. Globe 1776.) On June 20, 1870, a substitute for the original bill was adopted and on June 27, 1870, the bill passed the Senate with a proviso in it in regard to settlers which was substantially the same as the proviso in the bill as it finally passed. (41st Con., C. Globe 4638.)

The original purpose of the act of March 3, 1871,

was to build a trunk line across the southern portion of our country as an act of justice to the South, there having been aid given to three trunk lines across the northern and central portion of the country. Doubtless this would not have been considered at all if it hadn't been for this act of justice that the northern representatives in Congress felt was due to the South.

When this bill was messaged to the lower house there was a strong opposition to it on the ground that the policy had been adopted by Congress that no more grants of public lands should be made to railroads. Other members took the position that they would, as an act of justice, favor the grant to the Texas Pacific for its trunk line across the country, but they would absolutely oppose any act giving any aid to any branch lines.

The lower house passed a substitute for the Senate bill near the close of the 41st Congress, in which they eliminated from the bill all of the branch roads. The bill was later referred to a conference committee, which attached to it section 23 of this act, and on the last day and in the last hours of the 41st Congress the conference report was adopted without argument or discussion.

The history of this matter and the discussions that grew out of it will be found in the records of the 41st Congress, 3rd Sess., Con. Globe 1468, 1470, 1911, 1946, 1954, 1955; 3rd Sess. Appen. 193.

The growing sentiment against these railroad grants was also shown in memorials that were passed by the legislatures of the different states, and numerous peti-

tions of the people, protesting against any further grants to railroads and urging Congress to take steps to forfeit the grants that had already been made, where the terms and conditions of the grant had not been carried out by the railroad company.

Among other memorials was one passed by the legislature of the state of California and presented to Congress by Senator Casserly on January 21, 1870, more than a year prior to the passage of this act in question. Among other things the memorial recited:

"That numerous tracts of land in the state, amounting to about thirteen million acres, are now owned or claimed by a few railroad companies under grants from Congress. That said lands comprise a very considerable portion of the agricultural lands of our state. That the holding of or claiming of said large tracts of lands by a few persons has proven very disastrous to the interests of citizens by preventing the development of our resources and the settlement of our state. And it is further represented that more than one-half of the said thirteen million acres claimed by the Southern Pacific Railroad Company by the provisions of the act of Congress passed July 27, 1866, that the lands claimed by them virtually covers every alternate section now belonging to the United States to the width of sixty miles, from the bay of San Francisco for a distance of about six hundred miles to the southern line of the state." (2nd Sess. 41st Con., C. Globe 630.)

This referred to the original grant to the Southern Pacific Railroad Company and was passed by the legis-

lature of the state of California more than a year prior to the act involved in this controversy.

This shows pretty conclusively the prevailing sentiment of the state of California in regard to making any other grants to railroads of public lands lying in this state, and especially to this defendant.

As to the prevailing sentiment of the country at that time, see the proceedings in Congress during the 40th Congress, 2nd Sess., C. Globe 371, 637; 3rd Sess., Con. Globe 463; 3rd Sess. Appen. 70.

In the construction of laws and acts of Congress it is necessary to recur to the history and situation of the country to ascertain the reason as well as the meaning of their provisions.

In Preston v. Browder, 1st Wheaton 121, 4 L. Ed. 51, the court in the opinion said:

> "In the construction of the statutory or legal laws of a state, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable the court to apply with propriety the different rules for construing statutes."

In the case of the United States v. The Union Pacific Railroad Company, 91 U. S. 72, 23 L. Ed. 228, the court in the opinion said:

> "The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and it is frequently necessary, in order

to ascertain the reasons as well as the meaning of particular provisions."

(3) The Doctrine of In Pari Materia.

Another rule of construction which has been resorted to by the courts to enable them to determine the intent of the legislative body and what it had in mind when an act was passed, in order that that intent might be given effect, by placing that construction upon the legislative act, is the doctrine of *in pari materia,* that is, considering and construing together the laws that were passed during that period and contemporaneously with the time when the act to be construed was passed, legislating upon the same subject-matter involved in the act to be construed. In fact, the authorities seem to make it imperative upon the courts to reconcile and construe them together, acts passed governing the same subjects.

In Vol. 26 A. & E. Encyc. of Law, 620, the author announces the following proposition on this question:

> "In arriving at the intent of the legislature in enacting a statute, not only must the whole statute and every part of it be considered, but where there are several statutes *in pari materia,* they are all, whether referred to or not, to be taken together, and one part compared with another in the construction of any one material provision."

And further on page 623 he announces:

> "Especially does this rule apply to statutes passed at the same session of the legislature. If such statutes are *in pari materia,* they must be

> construed together, and if possible, all must be allowed to stand and effect must be given to each of them, regard being had to the intention of the legislature. So contemporaneous legislation, not precisely *in pari materia* with the statute to be construed, may be referred to on the question of intent."

How is it possible for the defendants to avoid the effect of this legal proposition? The grant to the Texas Pacific and the construction of the Texas Pacific was the primary object that Congress had in view by the act of March 3, 1871. The grant to the defendant, the Southern Pacific Railroad Company of California, was a part of this same act, and it could not be construed to be more than a secondary object that Congress had in view. If statutes that are passed at the same session of the legislature on the same general subject are *in pari materia* and must be construed together, how is it possible that different parts of the same act can be segregated and thus relieved from the conditions and limitations that follow if it was construed with the whole of the act of which it is a part? This fact alone would place a doubt upon the construction of section 23 of said act as to whether or not it referred, for its conditions and limitations and for the grant, to the act of July 27, 1866. When construed under the rules of construction, that must be invoked and the authorities supporting the same, which we will hereinafter call the court's attention to, it seems to us, it becomes impossible to construe this grant to the Southern Pacific as being effected by any other grant-

ing clause except that given under section 9 of the act of March 3, 1871, and subject to the proviso attached to said section.

In support of this proposition also see:

Hamilton v. Rathbone, 175 U. S. 414, 44 L. Ed. 219;

United States v. Freeman, 3 Howard, 11 L. Ed. 562;

United States v. Fischer *et al.*, 2 Cranch 400, 2 L. Ed. 318;

Saxonville Mills v. Russell, 116 U. S. 13, 29 L. Ed. 554;

Church of the Holy Trinity v. U. S., 143 U. S. 457, 36 L. Ed. 227;

Charles River Bridge v. Warren Bridge *et al.*, 36 U. S. 543, 9 L. Ed. 822;

Kohlsaat v. Murphy, 96 U. S. 153, 24 L. Ed. 846;

Lewis Sutherland's Statutory Construction, 2nd Edition, section 284 and note, sections 443-448, 548, 879.

The court will not be bound by the strict letter of the law. If the purpose and well ascertained object are inconsistent with the precise rules of a part of an act, the latter must yield to the paramount and controlling influence of the will of the legislature resulting from the whole.

This was clearly announced in the case of the church of the Holy Trinity v. United States, *supra*. The court in the opinion said:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind'; and further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force in this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within the spirit nor within the intention of the makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislature, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding the enactment or of the absurd results which follow from giving such broad meaning to the words, making it unreasonable to believe that the legislator intended to include the particular act."

In the case of Viterbo v. Friedlander, 120 U. S. 707, 30 L. Ed. 776, the court quoted with approval from Chief Justice Eustis as follows:

> "A statute must be construed with reference to its object, to the legislation and system of which it forms a part, in order to ascertain its true meaning and intent; and if its purpose and well ascertained object are inconsistent with the precise words of a part, the latter must yield to the paramount and controlling influence of the will of the legislature resulting from the whole. Commercial Bank v. Foster, 5 La. Ann. 516. And in Childers v. Johnson, 6 La. Ann. 634, the court said: 'It is a sound rule of interpretation, in construing an article of the code with reference to a subject-matter, to take into view the general system of legislation upon the subject-matter contained in the same work; and where a provision of the code is invoked in derogation of the common rule regulating the subject-matter, the intention so to derogate should be clear and beyond reasonable doubt. If an interpretation can be given to the particular article which, without doing violence to its terms, will make it harmonize with the general rules and the other provisions of the code regulating the subject-matter, such interpretation should be adopted.'"

In the case of Oates v. First National Bank, 100 U. S. 239, 25 L. Ed. 582, the court in the opinion said:

> "The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention and not to defeat it by adhering too rigidly to the mere letter of the statute, or to

technical rules of construction, and we should discard any construction that would lead to absurd consequences."

The following authorities also support these propositions:

United States v. Fisher *et al., supra;*

Wisconsin v. Forsythe, 159 U. S. 55, 40 L. Ed. 74.

The acts of Congress in regard to the disposition of the public lands and also the acts of Congress in regard to the donation of public lands to railroads constitute a system of laws, are all *in pari materia,* and to be looked to as one statute in explaining their meaning and import. The same being modified by Congress from time to time, as experience and observation show that they were defective or failed to meet the ends and purposes Congress had in view.

In the case of Wisconsin Central R. R. Co. v. United States, 164 U. S. 205, 41 L. Ed. 404, the court in the opinion said:

"An intention to surrender the right to demand the carriage of the mails over the subsidized roads at reasonable charges would be opposed to the policy established by well nigh uniform Congressional legislation on the subject, and although there may have been departures from that policy in a few instances under exceptional circumstances, none of them justify the contention that such departure was intended here."

In Doe, ex Dem, Patterson v. Winn *et al.*, 24 U. S. 385, 6 L. Ed. 501, the court in the opinion said:

> "The land law of Georgia is comprised under several statutes, passed at different periods, varying and modifying the system occasionally, as policy required. But all being *in pari materia,* are to be looked to as one statute, in explaining their meaning and import."

In the case of Ryan v. Carter, 93 U. S. 78, 23 L. Ed. 809, the court in the opinion said:

> "If there were any doubt remaining, about the correctness of this construction, it would be removed by a consideration of the act of 1807, which is *in pari materia.* Congress passed various laws, from time to time, respecting the claims to lands in the territories of Orleans and Louisiana. These laws were modified as policy required; but they constitute one land system, are all *in pari materia,* and to be looked to as one statute in explaining their meaning and import.

In the case of Kohlsaat v. Murphy, *supra,* the court in the opinion said:

> "In the exposition of statutes, the established rule is that the intention of the lawmaker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system. Resort may

be had to every part of a statute, or, where there is more than one *in pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent.

"Rules and maxims of interpretation are ordained as aids in discovering the true intent and meaning of any particular enactment; but the controlling rule of decision in applying the statute in any particular case is, that whenever the intention of the legislature can be discovered from the words employed, in view of the subject-matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which should never be imputed to the legislature, except when the language employed will admit of no other signification."

The proposition that laws *in pari materia* must be construed as if they formed parts of the same statute and were enacted at the same time is supported by the following authorities:

Plummer v. Murray, 51 Barbour (N. Y.) 202;
United Society v. The Eagle Bank, 7 Conn. 469;
Town of Highgate v. State, 7 Atlantic Rep. 898;
Sales v. Barber Asphalt Pav. Co., 66 S. W. Rep. (Mo.) 979;
State v. Gearheardt, 33 L. R. A. (Ind.) 313;
Reiche v. Smythe, 80 U. S. 162, 20 L. Ed. 566;
In re Moore, 66 Fed. 950.

Words cannot be segregated from the entire context and construed as unambiguous. As to the elements

that enter into the question of determining whether or not there is ambiguity, the case of O'Brien v. Miller, 168 U. S. 297, 42 L. Ed. 472, is instructive. The court in the opinion said:

> "There can be no doubt that, considered in themselves and alone, there is no ambiguity in the words found in the clause of the contract providing that 'if during said voyage, an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall inevitably happen, * * * this obligation shall be void. But the question presented involved not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then in every case it would be impossible to arrive at the meaning of a contract, in the event of a difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be

> brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."

Another case that is instructive upon the proposition that the courts will not follow the strict letter of the statute is found in the case of Dubuque & Pacific Railroad Company v. Litchfield, 64 U. S. 66, 16 L. Ed. 509, construing an act of Congress making a donation of land to the territory of Iowa. The uncertainty in the grant which afterwards arose, grew out of this language, "In a strip five miles in width on each side of said river." The donation was made to assist the territory of Iowa in improving the navigability of the Des Moines river from its mouth to the mouth of the Racoon Fork where it emptied into the Des Moines River, it being contended on the one side that that included a strip of land on each side of said river from its mouth to the north line of Iowa. The other contention was that it included only a strip from its mouth to the mouth of the Racoon Fork, which was comparatively a short distance along said river through the territory of Iowa. There probably never was an act of Congress upon which as many cases reached the Supreme Court, challenging the construction of the language, as resulted from this one. Even the land departments of the federal government first would take one view of it and then the other, finally deciding that Congress could not have intended to grant any land except from the mouth of the river to the Racoon Fork.

In support of this proposition also the following cases are cited:

Church of Holy Trinity v. United States, *supra;*
Green County v. Quinlan, 211 U. S. 594, 53 L. Ed. 341;
U. S. v. Central Pac. R. R. Co., 118 U. S. 235, 30 L. Ed. 174.

(4) The Reasonable Construction of the Language and Context.

The language and reasonable and natural construction of section 23 of this act, together with the context, it seems to us, makes it impossible for the court to adopt the construction placed upon it by counsel for the defendants for the following reasons:

(a) There is no granting clause in section 23 by which was made any grant of public lands to the defendant, the Southern Pacific Railroad Company. Unless the granting clause of section 9 of said act is referred to by this section and adopted as making the grant to the Southern Pacific Railroad Company, there is no grant contained in section 23. It is not claimed that any grant to the Southern Pacific Railroad Company, for the purposes set out in section 23 of this act was contemplated or made by the act of July 27, 1866. If the Southern Pacific Railroad Company got any grant under the act of March 3, 1871, and section 23 of that act, it was under and by virtue of that act alone that it acquired said grant. The only manner in which section 23 can be construed as referring back to and effecting the grant to the Southern Pacific at

the date of the passage of this act of March 3, 1871, would be by implication. A grant or conveyance will never be inferred and upheld by implication. We contend that of necessity the court should and must hold that the Southern Pacific Railroad Company obtained this grant for the lands involved in this controversy under and by virtue of the act of March 3, 1871, and the granting clause of said act contained in section 9 thereof, and was therefore bound by all of the terms and conditions of said act.

(b) It was impossible for this grant to the Southern Pacific Railroad Company to have been taken under the act of July 27, 1866, for the reason that the time in which the company was to commence the construction of said road and the amount of construction that was to be made and completed each year was not extended by the act of March 3, 1871, nor was the time in which the railroad company was to accept in writing, under its seal, the grant of 1866 extended. These two propositions are established by sections 8 and 12 of the act of 1866, which are as follows:

Section 8:

> "That the said company shall commence the work on said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, etc."

Section 12:

> "And be it further enacted: That the acceptance of the terms, conditions and impositions of

> this act by the said Atlantic & Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act and not afterwards, and shall be deposited in the office of the Secretary of the Interior."

In all of the Congressional acts reviving grants that had lapsed, Congress always deemed it necessary, as well as reviving the grant, to also extend the time within which the conditions precedent and subsequent should be performed. Section 23 makes no provision for extending the time within which the Southern Pacific Railroad Company could comply with the conditions in regard to accepting the grant and commencing the work or the amount of work that it was required to do each year, consequently it was absolutely impossible for it to have taken said grant under the *rights, grants* and *privileges* of the act of July 27, 1866. As a matter of fact they accepted said grant and commenced the construction of the road under the terms and conditions of the act of March 3, 1871, by simply filing their map of general location of the line.

By accepting any part of the act of March 3, 1871, the company, then, by all rules of construction, took the grant subject to all of the terms and conditions, rights and privileges of the act of 1871 and also under all of the terms and conditions of the act of 1866 which were not inconsistent with the privileges of the act of

March 3, 1871. It seems to us that this construction and conclusion is irresistible.

(c) If the language in section 23 of the act of March 3, 1871, is subject to the construction which the trial court placed upon the clause, "With the same rights, grants and privileges," without doing any violence to the language or rules of construction, it could also be construed as referring to the granting portion of the act of March 3, 1871, as contained in section 9 of said act. In other words, to give the language the benefit of a reasonable and the most liberal construction, and waiving all other arguments against construing it as referring to the granting clause of the act of '66 and admitting that it might, with equal propriety, refer to either the granting clause of the act of 1866 or the granting clause of 1871, which contains the settlers' clause, then the law which we have already cited and which the Supreme Court just recently, in the case of Oregon & C. R. R. Co. v. United States, *supra,* states is rudimentary, would be applicable, and that construction would be adopted which is most favorable to the public and against the defendants.

(d) Adopting the construction contended for by counsel for the defendants leads to absurd and irrational results and impugns the motives of Congress. It would certainly lead to ridiculous and absurd results in attempting to construe this section, to say that Congress meant and intended to load the primary purpose and object it had in mind in making this grant to the Texas Pacific, with this condition, and then give a large grant without any limitations, restrictions or

conditions to a branch road, a purely local proposition, to aid it.

(5) The Acts of Congress Making Grants to Railroads Show Settlers' Clause Attached to Every Grant After March 3, 1869, and the Court Will Avoid That Interpretation That Will Lead to Absurd and Ridiculous Results.

The history of Congress shows that from March 3, 1869, up to the passage of this act of March 3, 1871, there wasn't a grant made or an old grant revived or extended that did not have attached to it a settlers' clause. This had become the settled policy of Congress. It was incorporated in all of the land grant bills after that day as a matter of course and without any discussion or objection. The sentiment of the country had become so strongly opposed to land grants to railroads that, as counsel for defendants well said, in his brief filed with Judge Bledsoe in the case of Burke v. The Southern Pacific Railroad Company of California, *supra,* it would have failed but for the general feeling that the Southern states should have an opening to the Pacific, and this was the very last railroad grant ever made. Would it not be absurd and ridiculous to place upon this act a construction, under these circumstances, that placed Congress in the position of reversing the unquestioned established policy by adding the settlers' clause to all of these land grants and also adding it to the main purpose which induced the act of 1871, and giving without any restrictions, limitations or condi-

tions, a large grant to these defendants. Congress never intended such an absurd and ridiculous result.

The Supreme Court in many different cases has held that the courts will avoid making a literal interpretation of a law where such results will follow. We will content ourselves by quoting from one authority and simply citing others that announce the same doctrine.

In the case of Heydenfeldt v. Daney Gold & Silver Mining Company (93 U. S. 638, 23 L. Ed. 995) the court in the opinion said:

> "If a literal interpretation of any part of it would operate unjustly or lead to absurd results and be contrary to the evident intent of the act taken as a whole, it will be rejected; and there is no better way of discovering the true meaning of a law when there are expressions in it which are rendered ambiguous by their connection with other clauses than by considering the necessity for it, and the causes which induced the legislature to pass it. This interpretation, although seemingly contrary to the letter of the statute, is within its reason and spirit."

Kohlsaat v. Murphy, *supra;*

Church of the Holy Trinity v. United States, *supra;*

United States v. Fisher, *supra;*

United States v. Bashan, 50 Fed. 754;

Scott v. Latimer, 89 Fed. 846;

Davis v. Bohle, 92 Fed. 328;

Liverpool & London Globe Ins. v. Kearney, 94 Fed. 316.

For the reasons already given this question cannot be dismissed by simply saying that the language used in this section is so plain and unequivocal that it does not impose upon the court the necessity of placing any construction upon it other than what the plain language imports.

There is no question of forfeiture or cancellation of the grant involved in this case. It is admitted that the defendants have earned the grant and that their title to the grant is perfect, subject to the limitations of the proviso which we contend applies to this grant. The crucial question is, "Did they take the grant subject to the proviso and the limitations of section 9 of the act of March 3, 1871":

> "That all such lands, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

We insist upon upholding the grant, but urge that it was accepted by the defendants with the above restrictions and limitations and that they were bound by these, and that it is an enforceable covenant.

RECAPITULATION OF THE POINTS URGED TO ESTABLISH THE FACT THAT THESE DEFENDANTS ACCEPTED AND RECEIVED THIS GRANT, BURDENED BY THESE LIMITATIONS AND CONDITIONS, AND ARE BOUND BY THEM.

1. That the history of the legislation of Congress in regard to the public land policy and its policy in regard to land grants for internal improvements, and especially railroad grants, had been modified to the extent that all the later grants had incorporated in them the provision that all lands so granted should be sold to settlers only, in limited quantities and at limited prices, instead of an unlimited right to dispose of them as was given in the former grants.

2. The history of this act and the record of Congress made in regard to it from the time it was introduced until its final passage refutes every idea that the defendant, the Southern Pacific Railroad Company of California was to receive this grant on any other or more favorable terms than was given to the Texas Pacific Railroad Company.

3. The doctrine of *pari materia,* that is, construing this act with all other grant acts covering that period, as defining the policy of Congress on this subject, following the rule laid down in Ryan v. Carter, *supra,* in which the court said:

> "If there were any doubt remaining, about the correctness of this construction, it would be removed by a consideration of the act of 1807, which is *in pari materia.* Congress passed various laws, from time to time, respecting the claims to lands

in the territories of Orleans and Louisiana. These laws were modified as policy required, but they constitute one land system, are all *in pari materia,* and to be looked to as one statute in explaining their meaning and import."

4. The context and the language of section 23 of said act, and giving it its reasonable and natural construction, warrants and demands the construction we contend for.

5. It was impossible for the defendant, the Southern Pacific Railroad Company, to have taken this grant under the act of 1866, for the reason that the time in which it was required to perform many of the conditions in that act were not extended by Congress, and for that reason it was necessary for it to accept the grant under some of the conditions of the act of 1871, and if for no other reason, by doing this, it became bound by all of the terms of the act of 1871.

II.

If the Defendants took this Grant under the Terms and Conditions of the Act of 1871, what is the Character of the Estate they became vested with?

The Supreme Court in the Oregon & C. R. R. v. U. S. case, *supra,* has settled the proposition that this proviso is an enforceable covenant and not a condition subsequent. This being true, and the defendants having complied with the conditions precedent which they were required to perform, the title to these lands became absolutely vested in them in fee simple.

These conditions precedent were:

(a) That it file its map of general location of its line according to the terms of the act of March 3, 1871, which it did.

(b) That it commence actual work of construction and continue the same until completed within the time named according to the terms of the act.

Practically the same language might constitute either a

"Condition subsequent,"

"Trust estate,"

"Covenant,"

"Conditional limitation estate."

Which one of these estates are created by the language and terms used in the act of March 3, 1871, is to be determined by what Congress had in mind and intended when it passed the act. We have already reviewed the history fixing the policy of Congress in regard to the distribution of the public domain, and also of the grants of public lands to aid in the development of internal improvements; also all the facts and circumstances leading up to the passage of this act.

Congress attached these conditions to these grants to be enforced, and the courts, when these provisions have been before them, have so held, as we shall show by authorities which we shall later call the court's attention to.

Congress evidently did not intend to create an estate with a condition subsequent attached to it, such as most of these later grants had incorporated in them,

for this reason, that then the only one that could have taken advantage of it would have been the government in an action to forfeit the grant. If Congress had intended to create an estate with a condition subsequent, it would not have placed the government in this position, in case the defendants forfeited their rights to the grant, to have compelled it to have paid the company, before it could have successfully maintained an action to forfeit this grant, the sum of $2.50 per acre for the land. Congress certainly never intended to place the government in a position where, if the defendants failed to perform the conditions attached to their grant, that the government, in order to forfeit the same, would have to pay them for their land.

The conditions are such also that it is hardly probable that Congress intended, by the terms of this act, to create a trust and to constitute the defendants the trustee for the benefit of persons who might desire to settle upon this land.

Attached to this absolute title was a limitation by which it was to have the absolute use and control of said property to sell and dispose of as it saw fit, for three years after the completion of the entire road. Then upon the happening of two conditional limitations which were attached, its interests and rights in and to said property terminated.

(a) That if it had not been disposed of within three years after the completion of the entire road, and

(b) That the land should be held for persons who were eligible to make settlement or pre-emption upon public lands, by paying to the company a price not to

exceed an average of $2.50 per acre, to be fixed by and paid to the company.

The company did not sell this land within three years after the completion of its entire road, and this complainant and appellant is eligible to make settlement and pre-emption upon public lands, and has tendered to the company the amount of $2.50 per acre for this land and has demanded a conveyance of the land. We contend that this act of Congress contains all of the elements of a conditional limitation and that the defendants should be compelled to carry out the spirit and letter of the law.

This character of estate has been adopted and incorporated into the real estate law of this country. It applies and is permissible whether the title is conveyed by devise, conveyance, or grant. It was adopted and incorporated into the Civil Code of California, where it has remained and still is a part of that Code. Section 778 of the Code is:

> "A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate, and every such remainder is to be deemed a conditional limitation."

The Civil Code controls the methods of devise, descent and alienation of real estate lying within the jurisdiction of the state. (Section 755 Civil Code.)

We insist that the estate created by this act is a conditional limitation. It is distinguished from a condition in this: A condition brings the estate back to

the grantor—a conditional limitation carries it over to a stranger. A condition terminates an estate—a limitation creates a new one. A conditional limitation is an estate unknown and impossible under the common law.

In the case of Smith v. Smith, 23 Wis. 181, the court in the opinion said:

> "A limitation is conclusive of the time of continuance, and of the extent of the estate granted, and beyond which it is declared at its creation not to be intended to continue. Conditions render the estate voidable to entry. Limitations render it void without entry. If, upon failure of that upon which the estate is made to depend, no matter how expressed in the deed, the land is to go to a third person. This is a limitation over, and not a condition, for if a condition, an entry by the grantor would be necessary; and he might defeat the limitation by neglecting to enter. A limitation is imperative and is determined by the rules of law. A condition not only depends on the option of the grantor, but it is also controlled by equity, if the grantor attempts to make an equitable use of it. The performance of a condition is excused by the act of God, or of the law, or the party for whose benefit it was made. A limitation determines the estate absolutely, whatever be its nature."

In the case of Hammond v. Rd. Co., S. C. 33, the court in the opinion said:

> "What is the effect of a subsequent condition? There is a broad and wide distinction between a condition and a limitation. A limitation upon a condition, or, in other words, a conditional limita-

tion, is where the property is limited over to a third party, in case the condition be not fulfilled, denominated by Littleton 'A condition law.' Gen. Inst. 234. In such case the estate determines *ipso facto* that the contingency happens."

In the case of Lockridge v. McCommon, 90 Tex. 238, the court in the opinion said:

"The plaintiff in error claimed that the conveyance from Andrew and Annie Lockridge to Robert E. Lockridge created in the latter an estate in fee simple upon conditional limitation. Of this class of estates it is said: 'Conditional limitations could not exist at common law.' They arise only out of certain conveyances owing their existence to statutes the effect of which is to dispense with 'livery of seizen.'

* * * * * * * *

"A conditional limitation is of a mixed nature, and partakes of a condition and of a limitation, as if an estate be limited to 'A' for life, provided that when 'C' returns from Rome it shall thenceforth remain to the use of 'B' in fee, it partakes of the nature of a condition, inasmuch as it defeats the estate previously limited, and is so far a limitation, and to be distinguished from a condition, that upon the contingency taking place the estate passes to the stranger without entry, contrary to the maxim of law, that a stranger cannot take advantage of a condition broken."

In the case of Towle v. Remsen, 70 N. Y. 312, the court in the opinion said:

"To constitute a conditional limitation, the limitations must be over to a third person. As in the

case stated in 2nd Black. Com. 155, land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until, out of the rents and profits, he shall make 500 pounds, and the like."

3rd Gray, Mass. 148, 149, the court in the opinion said:

"One material difference, therefore, between an estate in fee on condition and on a conditional limitation, is briefly this: that the former leaves in the grantor a vested right, which, by its very nature, is reserved to him, as a present existing interest, transmissible to his heirs, while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time.

* * * * * * * *

"Bearing in mind these distinctions, it is obvious that the devise in question was not the gift of an estate on a condition merely, but it also created a limitation over, on the happening of the prescribed contingency, to a third person and his heirs forever. It was therefore a conditional limitation, under which general head or condition may be comprehended every limitation which is to vest an interest in a third person on condition or upon an event which may or may not happen. Such limitations include certain estates in remainder, as well as gifts and grants, which, when made by will, are termed executory devises, and when contained in conveyances to uses, assume the name of springing or shifting uses."

Williams v. Jones, 166 N. Y. 537;

Fowlkes v. Wagoner, 46 S. W. 586.

A further instructive authority upon an estate of this character, and which construes sections of the Civil Code of California is found in the case of Taylor v. McCowen (154 Cal. 803-4). The court in the opinion said:

> "The next objection is that the suit involves the adjudication of a forfeiture of the estate of Charlotte Budd Armstrong in an action in equity. This, it is claimed, cannot be done, the proposition asserted being that 'it is a universal rule in equity never to enforce either a penalty or a forfeiture.' Numerous authorities are cited to this effect. It is claimed that the plaintiff was required to establish the fact that Charlotte Budd Armstrong, by removing from the land, had forfeited her estate; that it is necessary for him to begin an action for that express purpose, or to terminate her estate by an entry, and that until he has done so he cannot go into equity and quiet the title of his intestate to the said land, which, according to defendant's contention, could only vest in his intestate by reason of the forfeiture. This objection assumes that the estate of Mrs. Armstrong was an estate upon conditions subsequent that can only be divested by an entry for condition broken, or by a judgment at law. The estate which, by the terms of the decree, was vested in Mrs. Armstrong was not an estate upon condition, but a conditional limitation. The happening of the condition does not, in contemplation of law, in case such as that before us, operate to forfeit the estate given to the first taker, but merely to determine it, that is, bring it to an end. Section 778 of the Civil Code is:

" 'A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.'

"Section 773 declares that:

" 'A fee may be limited on a fee upon a contingency, which, if it should occur, must happen within the period prescribed in this title.'

"The latter clause describes precisely the estate herein created in the intestate of the plaintiff. The distinction between conditional limitations, contingent remainders, and estates upon conditions subsequent, and the different consequences, as to the taking effect of the subsequent estate, is clearly set forth in 2nd Washburn on Real Property, 6th Edition, Sec. 1640.

* * * * * * * *

"See also to the same effect 1st Washburn on Real Property, 6th Edition, Sec. 165; see also 2nd Washburn on Real Property, 6th Edition, Sec. 970; 4 Kent's Comm., 127; Miller v. Levi, 44 N. Y. 494; Stearns v. Godfrey, 16 Maine 160; Coppage v. Alexander, 41st Ken. 2 B. Mon. 313; Jewell v. Pierce, 120 Cal. 83. The latter case is practically the same as the case at bar, and although the point here made was not raised, the suit to quiet title was treated by the court as a proper method of establishing a title in the owner of the subsequent estate. In the present case, therefore, no proceedings for a forfeiture, or by way of re-entry for condition broken, was required as a condition precedent to a suit in equity to establish the title. The estate of Mrs. Armstrong terminated, *eo instanti,* upon her removal from

the land, and that of the plaintiff's intestate immediately vested as a legal estate in possession."

This character of estate is defined by Washburn in his work on Real Property, sections 970 and 1640.

Under this grant the United States conveyed an absolute fee to the lands upon the two conditions precedent.

(a) That the company file its map of general location of its land within the time specified by said act, and,

(b) Build the sections and complete its road within the times specified in the act.

Upon these conditions being complied with by the company, the government parted with every interest it had in the land, both present and prospective, but it attached to the title a limitation that if the company had not sold or otherwise disposed of the lands within three years after the date of the completion of the entire road, all the said lands should be subject to settlement and pre-emption, the same as other lands, upon payment to the company of a price not to exceed an average of $2.50 per acre. The company had from the time the lands were earned up to three years after the completion of the road to handle and dispose of these lands as it saw fit. After that its estate in said lands terminated and it could thereafter sell the lands only to persons eligible to settle upon or pre-empt public lands, upon being paid by them an average of not to exceed two dollars and fifty cents per acre.

Upon the happening of these two things, the expira-

tion of three years after the completion of the road, the land not sold or otherwise disposed of, and the offer of one who was eligible to make settlement and pre-emption to pay the company the purchase price of not to exceed an average of two dollars and fifty cents per acre, and is able to do it, the interest of the defendants in said lands terminated *eo instanti*. As we have already seen, this grant is more than a conveyance. It is a law, and every word, phrase and sentence of it must be given effect. The company cannot avoid the effect of it by sitting down and refusing to make a price on these lands, or not offering them for settlement as provided by this act. It will not be permitted to defeat its plain objects and purposes in that way, but will be compelled to carry out the provisions of this law which it has solemnly accepted and consented to. The language of the law, the conditions surrounding its enactment, and the purpose Congress had in mind and intended in making this grant, clearly brings it within the spirit and letter of the law of conditional limitations, as defined in the law on that subject, and is supported by the authorities we have cited *supra*.

Every condition and limitation and element required are present. Under the facts and law we have already called the court's attention to, it seems to us that our conclusion that this is a conditional limitation is irresistible.

III.

What Rights would this Complainant, who is Eligible to Settle and Pre-empt Public Lands have under said Act where the Company had not sold or otherwise disposed of the Granted Lands within three years after the Completion of its Entire Road?

It becomes important to carefully compare and consider the provisos in the acts passed upon by the court in the case of Oregon & C. R. R. Co. v. United States, *supra,* and the proviso contained in the act of March 3, 1871.

The proviso in the act of April 10, 1869, is:

> "And provided further, that the lands granted by the act aforesaid shall be sold to actual settlers only in quantities not greater than one quarter section to one purchaser and at a price not exceeding $2.50 per acre."
>
> 16 S. at L. 47.

The proviso in the act of May 4, 1870, is:

> "Shall be sold by the company, only to actual settlers in quantities not exceeding one hundred sixty acres or a quarter section to any one person, and at prices not exceeding two dollars and fifty cents per acre."
>
> 16 S. at L. 94.

The proviso in the act of March 3, 1871, is:

> "And provided further: that all such lands, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at

> a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."
>
> 16 S. at L. 573.

There is a marked distinction between the conditions contained in the acts of April 10, 1869, and May 4, 1870, which were before the court for interpretation and construction in the Oregon case, *supra,* and the conditions of the act of March 3, 1871, the act involved in this action.

Actual settlers were the persons named in the first two provisos, and the court, in the Oregon case, *supra,* in construing these words, said:

> " 'Actual settlers' are the words of the provisos, and we may assume actual settlers were contemplated and sales of the lands were restricted to them."

Actual settlers are not mentioned in the act of 1871. So far as we have been able to ascertain there were just three grants which had provisos similar to the one involved here. They were the grant to the U. P. R. R. Co. on July 1, 1862 (Vol. 12, page 489); the act of May 31, 1870, to the N. P. Railroad Co. (Vol. 16, page 378); and this act of March 3, 1871, to the Texas Pacific Railroad. All other grants provided that all the lands granted should be sold to "actual settlers only."

The provisions of the three grants above were much more liberal in the rights to the railroad. They granted the right to the railroads to dispose of the lands on

such terms and to such persons and in such quantities as they saw fit for a certain period after the completion of their road. After that the lands were to be sold to persons eligible to settle or pre-empt public lands.

Another marked distinction was that the companies were to be paid a maximum price for the land by the persons designated as having the right to purchase. The acts involved here made it the duty of the companies to fix the price not to exceed a certain maximum and to receive the same from the applicants offering to purchase,—another marked distinction.

Congress did not make these distinctions by accident. It doubtless had a well defined purpose in mind. It intended that these conditions should be enforceable. The court in the Oregon case, *supra,* has put to rest this contention, by holding that these provisos are enforceable covenants, and the courts will find some way to make them effective. On page 925 in the Oregon case, *supra,* the court in the opinion said:

> "In conclusion we cannot refrain from repeating that the case in its main principles is not in great compass. It has been given pretension and complexity by the happening of the unforeseen, the lapse of time, change of conditions, and the contests of interests. These, however, are but accidents, giving perplexity and prolixity to discussion. Judgment is independent of them. It is determined by the simple words of the acts of Congress, not only regarded as grants, but as laws, and accepted as both; granting rights, but imposing obligations,—rights quite definite, obligations as much so. The first had the means of

> acquisition; the second, of performance, and as we have pointed out, whatever the difficulties of performance, relief could have been applied for, and, it might be, have been secured, through an appeal to Congress. Certainly evasion of the laws or the defiance of them should not have been resorted to."

This language is very significant, and, it seems to us, throws much light upon the proper construction to give the proviso in the acts in the case at bar, and determines, it seems to us, the question that a way will and must be found by the courts to enforce the law and to avoid such a construction as will relieve the defendants from the limitations imposed and make of the law unenforceable covenants, and thus make the requirements impotent, and, as the court said, in the Oregon case, *supra,* on page 924:

> "Instead of securing settlement would prevent it; instead of devoting the lands to development, retain them in monopoly and a kind of mortmain."

If the appellant and persons who place themselves in a like situation cannot maintain this action and enforce specific performance, will not the condition become a dead letter, and these defendants thus be able to defeat the intention and purpose of the law? In omitting the words "actual settlers" from this proviso, did not Congress intend to give some other and different rights to persons designated to acquire this land than was given to "actual settlers" under their provisos?

Counsel for the defendants contends that the provisions of this act are too uncertain and indefinite in three particulars.

(a) The beneficiaries are uncertain and it is impossible to determine who would have a right to purchase, under said law, the land.

(b) That it is too uncertain as to the subject-matter. No one could determine how much, up to the maximum one would acquire, that any one desiring to purchase might take.

(c) That the amount that a proposed purchaser should pay is not fixed and certain.

We contend that under the authorities which we shall hereafter call to the court's attention, that neither one of these objections is tenable. The class of citizens who are eligible to make settlement and pre-emption upon the public lands are particularly and definitely defined and described in the federal statutes. They are just as certainly known as are the heirs of "A" that may be living at his death. Each one of this class has the right to exercise this right to purchase these lands until the lands are exhausted, the only qualifications required are that he be eligible to locate upon public lands as a settler or pre-emptor.

In construing similar provisions in laws governing the initiation of rights in public lands, the courts have never denied to the proposed settler or locater that he could not acquire any right at all in lands because the law did not definitely fix the amount that he may acquire by such settlement or location. On the contrary, the courts have consistently held that a settler or

locater had a right to acquire any amount of land less than the maximum amount that he was permitted to acquire.

As to the price for which a proposed purchaser should pay for said lands, it was the duty of the company, under said law, immediately after the expiration of three years after the completion of its entire road, to offer said lands for sale to settlers at a price not to exceed an average of $2.50 per acre. The company had this right and it was its duty immediately to exercise it. If it considered any of said lands so granted worth less than $2.50 per acre, to apportion the price so that in the aggregate they should receive an average of $2.50 per acre for the lands that remained unsold, and no more than that price. Instead of the company doing this, it has denied the contract and insisted that it was not bound by it, and has neglected and refused to offer said lands for sale to settlers at any price. The fact that the defendants have neglected and failed to comply with the terms of said law and offer said lands for sale at the time and at the price in said act fixed, it has waived its right to, at this time, insist that it have the privilege of apportioning the price for which said lands shall be sold to actual settlers, and when it is offered in good faith by persons who are eligible to purchase said land, the maximum price said law fixed for it, it should not be allowed to question the price, at this time, but be compelled to carry out this contract.

The acceptance of the grant under the terms and conditions of the act of Congress of March 3, 1871, by the Southern Pacific Railroad Company of California

made this act a formal standing offer, according to the terms of said act, and an invitation to all qualified citizens of the United States to become purchasers thereof, by paying to the company or its successors the maximum price for said lands, to-wit: $2.50 per acre.

The legislature of the state of Washington passed an act on October 26, 1870, providing a method for the disposal of the swamp and overflowed lands inuring to her under the act of Congress of March 21, 1860. The provisions of section 3 of said act are quite similar to the provisions of the act of March 3, 1871, now under consideration. It provided as follows:

> "The swamp and overflowed lands of this state shall be sold by said commissioner at a price not less than one dollar per acre in gold coin. Any person over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration to become a citizen of the United States as required by the naturalization laws, may become an applicant for the purchase of any tract or tracts of said swamp and overflowed lands, upon filing his application therefor (describing the tract or tracts he desires to purchase) by the actual survey."

The act, the court will notice, allows any person over the age of twenty-one years and being a citizen of the United States, or having filed his declaration to become a citizen, as required by the naturalization laws, to become an applicant for the purchase of any tract or tracts of swamp and overflowed lands, upon filing his application therefor, describing the tract or tracts he desires to purchase by the actual survey. The court

will observe that the particular citizens that can exercise this right is not named nor is the particular piece of land or the quantity that he may apply for, or the price he has to pay for same, designated by the act, it being more general and uncertain in these provisions in these particulars than the act in question.

An action involving the construction of this statute was before the Supreme Court (140 U. S. 1, 35 L. Ed. 363), Pennoyer v. McConnaughy. The Supreme Court, in passing upon this case, in the opinion said:

> "The position of the complainant below is, that as the swamp lands of the state were for sale, upon the terms and conditions mentioned in the act of 1870, a valid contract, binding upon both parties to it, was completed between the state and the applicant the moment a legal application to purchase was filed with the proper officer of the state and accepted by him."

Quoting also, in said opinion, a part of the opinion of Judge Deady of the United States Circuit Court of the District of Oregon, in passing upon the case:

> "The transaction, as set forth in the statute, has all the elements of a contract of sale. The statute is a formal standing offer by the state of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract therefor with the board, and complying with the subsequent conditions of payment and reclamation."

Justice Lamar, in commenting upon this part of Judge Deady's opinion, said:

> "We think this view very forcible, and it would be conclusive to our minds but for the consideration which suggests itself that the bare application itself, unaccompanied by the very payment of any consideration, partakes somewhat of the nature of a pre-emption claim under the laws of the United States, with reference to which it has been held that the occupancy and improvement of the land by the settler, and the filing of the declaratory statement of such fact, confers no vested right upon him, as against the government of the United States, until all the preliminary acts prescribed by law, including the payment of the price, are complied with. But we do not deem it necessary to determine whether the court was correct in that view of the case, for, in our opinion, another element of the case is of sufficient importance to control its disposition. Even if no vested right accrued to the applicant, immediately upon the filing of his application and its acceptance by the authorities of the state, it is conceded on all hands that he acquired such a right upon the payment of the twenty per centum of the purchase price of the lands embraced in his application, if such payment was made in accordance with the law."

Referring to that part of this decision in which Justice Lamar speaks of it as partaking of the nature of a pre-emption claim under the laws of the United States, we would say that the Supreme and Federal courts have modified the former holdings of the Supreme Court, that a filing of itself did not give the

locater any equitable or vested right in the land, and these later decisions have broadened out to a considerable extent these former opinions, and they hold that the filing upon land that was subject to location by a qualified citizen gives to that citizen, in itself, an equitable and vested right which the government could not divest him of, in case he followed up such filing by performing all of the conditions that were required of a locater to do, in order to become vested with the absolute title to the land.

We also think these questions have been settled in the case of Hall v. Russell (101 U. S. 504, 25 L. Ed. 829.) The court there had under consideration for construction what was known as the "Oregon Donation Act." Section 4 of said act in part was as follows:

> "That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the 1st day of December, 1851, now residing in said territory, or who shall become a resident thereof on or before the 1st day of December, 1850, should have the right to acquire him a half section to a section of said lands, according to the circumstances."

The court will observe that any one qualified under said provision had the right to acquire from half a section to a section of said lands. The land he might

acquire is uncertain and indefinite just as is urged that the law under the case at bar is uncertain. The controversy in that case was between persons who claimed to be actual settlers on the land. The court, in discussing the questions involved, on page 509 in the opinion says:

> "The opening words of section 4 are: 'That there shall be, and hereby is granted.' This is appropriate language in which to express a present grant, but was well remarked by Mr. Justice Field for the court in Missouri, Kansas & Texas Ry. Co. v. Kansas Pac. Ry. Co. (97 U. S. 491), where he says: 'It is always to be borne in mind in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of the Congress. There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee, and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time.
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> "Coming, then, to the present case, we find that the grantee designated was any qualified settler or occupant of the public lands * * * who shall have resided upon and cultivated the same for four consecutive years and shall otherwise have

conformed to the provisions of the act. The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee he took the grant and his right to a transfer of the legal title from the United States became vested, but until he was qualified to take, there was no actual grant of the soil. The act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and to maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the territory having the other requisite qualifications."

The defendants contend that there are certain preliminary steps that settlers or locaters upon public lands are compelled to take before they are entitled to have the land conveyed to them, and that until these preliminary steps are taken, no locater or settler is in a position to demand of the defendants a deed for the lands, even upon payment of the maximum price of $2.50 per acre.

Congress certainly was not trifling when it annexed to these railroad grants the condition that the lands granted should be sold to settlers only, in limited quantities and at a maximum price.

When Congress passed this act it certainly meant that if the railroad company had any of these lands left three years after the completion of its entire road, that then it should sell these lands to persons eligible

to settle or pre-empt public lands, upon their paying to it an average of not to exceed $2.50 per acre.

Contrary to most of the provisions in similar grants to this, the company was allowed to retain that much of an interest in these lands which it should be paid for when the same was claimed by any one eligible to settle upon the public lands. Congress certainly did not contemplate or intend that persons who were eligible and desired to acquire this land should commit a public offense by becoming a trespasser upon this land, which they would have to do if they undertook to initiate a right according to the homestead, pre-emption or desert claim acts, so that Congress must have waived all of the preliminary steps necessary to have been taken, if the land had remained a part of the public domain, and the only steps that would be necessary for those who are eligible to purchase these lands would be to pay the railroad company the money and demand from it a deed.

The fact that the government has parted with all its interest in these lands, and has no longer dominion or control over them, waives its right to demand of the settlers upon these lands that they shall occupy them a certain time and make certain improvements upon them before they can demand their titles. The government is the only authority and tribunal that can demand of settlers these things and can pass upon these preliminary steps, required to be taken. It can waive them or any other requirements through Congressional acts, and if it has waived its right to demand that they be done, or has placed itself in a position where it cannot

require them done, then the settler in this case would have a right to tender to the defendants the maximum amount Congress fixed for these lands to be sold at, or such less amount as the defendants might name, and upon the happening of that event, the interest of the company in that piece of land would immediately terminate, and it would have nothing but the naked legal title remaining in it, and the settler would have the right to have the title conveyed and vested in him.

Congress may deal with public lands in any manner that it sees fit. In the case of the United States v. The Midwest Oil Company *et al.*, 59 L. Ed. 309, the Supreme Court in the opinion said:

> "Congress may deal with such lands precisely as an ordinary individual may deal with farming property. It may sell or withhold them from sale. Canfield v. United States, 167 U. S. 524, 42 L. Ed. 262, 17 Sup. Ct. Rep. 864; Light v. United States, 220 U. S. 536, 55 L. Ed. 574, 31 Sup. Ct. Rep. 485. Like any other owner, it may provide when, how and to whom its land can be sold. It can permit it to be withdrawn from sale. Like any other owner, it can waive its strict rights."

In the case of Hall v. Russell, *supra,* the court said:

> "Congress had the right on assuming undisputed dominion over the territory to confine its bounties to settlers under just such limits as it chose."

This right is clearly pointed out in the case of Cooper v. Sioux City and Pacific R. R. Co., in a de-

cision handed down by Secretary Teller, Vol. 1, Land Decisions, 349. The secretary in the opinion said:

> "The statute expressly prescribes that the minimum price ($1.25) per acre for such land, so settled upon and pre-empted, shall be paid to the company. No authority is delegated to the register and receiver to receive such purchase money or to issue certificates therefor; no machinery is provided by the statute. If such delegation were attempted by this department it would be manifestly without sanction of law. The lands having been granted as aforesaid to the company, belong to the same; and hence, all tenders of purchase money should be made directly to it and would-be pre-emptors of such lands must look to the company and not to the government for title. And, if this be so, it may be assumed that, in case the lands be not otherwise disposed of, a party having settled and improved the land in such manner as would accept a pre-emption right to lands of the United States, may tender purchase money to the company and demand his deed; and if the same be refused, that he may maintain an action in equity to compel its execution; but in all this there is no room for further intervention by the Land Department."

Authority for the right of the settler to maintain an action of this character is found in the case of Platt v. Union Pacific (99 U. S. 48, 25 L. Ed. 424). In the Union Pacific grant a provision almost identical with the provision of the act of March 3, 1871, was incorporated. Three years after the completion of its road the plaintiff, Platt, settled upon a quarter section of

land in the state of Nebraska, included within this grant. The Union Pacific instituted an ejectment suit against Platt for the possession of said land. Platt brought an action to enjoin the company from further prosecuting this action of ejectment against him. There was no question raised as to the right of the plaintiff Platt to maintain said action. It was tried through the United States Circuit Court of the District of Nebraska, and appealed to the Supreme Court of the United States, where a final judgment was entered. Platt was unsuccessful in his suit, but not on the ground that he did not have a right to maintain an action, but the case went out on another proposition.

The following cases also support this proposition:

U. S. v. Mo. etc. Ry., 141 U. S. 378, 35 L. Ed. 766;

Lynch v. Okla., 13 Okla. 147;

San Pedro Tin Co. v. U. S., 146 U. S. 132, 36 L. Ed. 911;

San Jacinto Tin Co. v. U. S., 125 U. S. 285, 31 L. Ed. 747;

N. P. Rd. Co. v. Trodrick, 221 U. S. 208, 55 L. Ed. 704;

Barden v. N. P. Ry. Co., 154 U. S. 288, 38 L. Ed. 992.

Counsel for the defendants contend that this is not such a contract or law as the courts will or can enforce, because it is incomplete. It is unnecessary that a contract be complete and that the minds of the parties have met on every part of it in order that it may

be enforceable in a court of equity. Where the contract is that the land shall be reconveyed, not at a price to be agreed upon by the parties, but at a fair price or at a fair valuation, the court will direct the valuation to be made and will enforce the performance of the contract, and when the parties have defined and agreed upon a plan by which the value may be ascertained, the courts will compel specific performance.

Pomeroy on Specific Performance on Contracts, sections 151 and 158.

In section 151 he says:

"The second class embraces those contracts in which a mode for ascertaining the price is mentioned, but from the language of the stipulation it is regarded as non-essential, and as something rather by way of suggestion, so that the agreement itself is virtually one to sell for a fair price. In such a case, if the means specified for fixing upon the price fail, for any reason, the court does not treat the contract as fatally defective, but will, in the suit for a specific performance, direct a fair and reasonable price to be ascertained in some manner preliminary to the decree, either by referring the matter to a master or other officer, or by appointing a skilled person as a special valuer, or even by determining the amount itself. It will pursue any such mode as the circumstances of the case show to be expedient.

* * * * * * * *

"The court will always look at the substance of the agreement, and disregard the mere forms which had been provided for effectuating it, and which cannot be made operative."

In section 158 he speaks as follows:

> "Under these circumstances, if, through neglect of the defendant or from any other cause other than the plaintiff's own default, the provisions have not been carried into effect, the court will, as a preliminary to its decree, and as a step in the cause, provide a substituted method for accomplishing the object of the provision and completing the agreement."

To the same effect see:

Van Doren v. Robinson, 16 N. J. Eq. 260;

Duffy v. Kelley, 55 N. J. Eq. 627;

U. S. Security & Bond Co. v. Riddle, 18 Colo. App. 107;

Fry on Specific Performance, 5th Ed., Sec. 353 *et seq.;*

Baker v. Metropolitan Ry. Co., 31 Beavens R. Eng. 504.

The language of this grant is that the land not sold or otherwise disposed of within three years after the completion of the entire road shall be subject to settlement and pre-emption the same as other lands, at a price to be *fixed* by and paid to the said company, and at an average of two dollars and fifty cents per acre, the manner of fixing the price per acre and the maximum amount it could obtain as a consideration for said lands in the aggregate. It gave the company the privilege of apportioning this price according to its best judgment of the relative value of the lands, but in the aggregate this price should not average more than two dollars and fifty cents per acre. There is

nothing uncertain or indefinite or incomplete about this law or contract.

The company knew just what it was getting when it accepted the grant and the law. It is such a contract and law as the courts can and will enforce. The company cannot avoid its force and effect by refusing to make a price on the land and offering it for sale as it agreed to when it accepted the grant, and when it fails and refuses to comply with these provisions the court will enforce it at the instance of the parties for whose benefit it was made.

In the Oregon case, *supra,* the interveners in that case were in the same position as the appellant in this case places himself as a prospective settler. The contention of the interveners in the Oregon case was that the provisos of the acts of April 10, 1869, and May 4, 1870, created a trust for those who might desire to acquire title thereto. The question as to the character of the railroad company's estate being one of conditional limitation, it was not presented nor passed upon by the court in the Oregon case.

We contend that that is wherein the distinction is in the rights created under the provisos that were involved in the Oregon case and the proviso of the acts involved in this action. The Supreme Court, upon the theory that was presented to it on behalf of the interveners in the Oregon case, decided that upon the express words of the proviso the word "actual" expressing a settlement completed, and could not be construed to include "contemplated or possible." The

court in that opinion, page 922, in discussing and disposing of the contentions of the interveners, said:

> "The interveners concur with the cross-complainants that the acts created a trust, but assert that they have a broader extent. In other words, and as their counsel express it, the intention of Congress was to create a trust in the granted lands for the benefit of those who might desire to acquire title thereto; that is, not actual settlement was the condition of purchase, but an intention to settle, with the qualification to do so. Here, then, is a conflict between the asserted beneficiaries of the asserted trust—whether *actual settlers,* as cross-complainants contend, or *applicants* for settlement, as the interveners insist. The distinction would seem to be real and cannot be confounded. The word 'actual' expresses a settlement completed, not simply contemplated or possible. Upon the express words of the provisos it would seem that interveners' claims to be beneficiaries of the trust, if there is a trust, must be refuted."

This quotation from that case sets out clearly and distinctly the question that was presented to the court on behalf of the interveners in that case and the question passed upon by the court and the reason for holding as it did. The conditions of the act of March 3, 1871, are quite different from those involved in the Oregon case, and, we contend, give rights to prospective purchasers that were not and could not have been contemplated or included in those provisos.

These motions to dismiss are in effect demurrers,

and in form they are general demurrers. The court sustained these demurrers and denied the appellant the right to amend his amended bill. The motions of the defendants to dismiss were submitted to the trial court upon the theory that the propositions of law involved were sufficiently pleaded to raise these questions.

It is the earnest desire of the appellant that the court pass upon the crucial propositions herein presented by the defendants' motions to dismiss and construe the acts of Congress involved herein and thereby determine the status and rights of the parties to this action.

If the court is of the opinion that the complaint or bill is not sufficient in any allegations in which it could be amended, then that such questions be disregarded by it and the complainant given leave and directed to make the necessary amendments at once. If the facts are not sufficiently pleaded in the complainant's amended bill, then the trial court has committed reversible error in denying the complainant the right to amend his bill, and this court should either permit the amendment to be made at this time or reverse the judgment on the ground that the trial court committed reversible error in not allowing the appellant to amend his bill.

We think this proposition needs no argument or citation of authorities to satisfy this court that our position in this particular is well taken. The motions to dismiss being in form a general demurrer, if a bill ever so crudely and indefinitely states facts sufficient to present the legal questions that were presented to the court

in this bill, and are urged in this court, are pertinent and are questions for this court to consider, pass upon and determine. The fact that it was tried in the trial court is sufficient for this purpose, and if the case has been submitted to the trial court and passed upon by it as being sufficient, it seems to us settles the sufficiency of the allegations in that particular.

These questions have been raised by numbers 72 and 73 of the assignment of errors. [Record, p. 36.]

We believe that the reasons we have given, asking for the construction that we contend for of these acts, are well founded and that they have the support of the court of last resort of this country. We believe that the contention of the defendants in support of their motion to dismiss is not well taken, and that the motion should have been overruled, and that the court should, in overruling said motion, have determined that the defendants are bound by all of the provisions and conditions of the act of March 3, 1871, and that all the lands granted in said act to the defendants which had not been sold or otherwise disposed of within three years after the completion of their entire road, could be sold only to persons who were eligible to make settlement or pre-emption upon public lands, at an average price of not to exceed two dollars and fifty cents per acre. That the defendants, having failed to apportion this price up to this time, and having denied that they were bound by the terms of said law, that they should be held to have waived their rights to apportion the price and that they should be compelled

to convey their interests in said lands to any persons eligible, upon the payment to them of the maximum price fixed in said law, of two dollars and fifty cents per acre.

It is therefore respectfully submitted that the decree of the court below must and should be reversed.

J. Mack Love,

Solicitor and Attorney for Complainant and Appellant.